IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-592

KANSAS REFINED HELIUM COMPANY, A DIVISION OF ANGLE INDUSTRIES, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION IN OPPOSITION

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STATEMENT

Petitioner's statement of the case makes it appear that the three employees in this case refused reinstatement to their jobs for no valid reason whatsoever, that they thereafter suffered losses in earnings, and that

the Court of Appeals has unjustly held petitioner liable for those losses. The facts are quite different.

The employees involved were discharged by petitioner in 1966 as part of "an anti-union campaign marked by massive and systematic violations of the Act," which included "coercive interviews with virtually every employee, threats of plant closure and discharge for union activity, and the discharge of six union supporters." (A4). Because of the egregious nature of the violations, the NLRB not only initiated unfair labor practice proceedings but also petitioned a District Court for an immediate injunction under Section 10(j) of the National Labor Relations Act, 29 U.S.C. §160(j). An injunction was ultimately granted which, *inter alia,* required petitioner to offer reinstatement to the discharged employees "pending the final determination of this matter by the Board." Petitioner, after unsuccessfully seeking a stay of the injunction, did make the offers of reinstatement, using the precise language of the injunction to make clear that the employees were only being offered temporary employment "pending a final determination of this matter by the Board." (A5-A6). At the same time, petitioner appealed the injunction to the Tenth Circuit.

It is important to understand that these offers of reinstatement were not offers of unconditional and permanent reemployment. Rather they were involuntary offers, made pursuant to an injunction, to rehire the employees for as long as the injunction remained outstanding. At the time the offers were made the injunction was pending on appeal, and if the appellate court were to reverse the injunction petitioner would have been free to terminate the employees once again. Furthermore, the injunction by its terms was to lapse

in any event when the underlying unfair labor practice case was decided by the Board, regardless of which way the Board's decision went.[1]

At the time the reinstatement offers were made, two of the employees, Harris and Johnson, had already found new jobs far from Otis, Kansas, where petitioner's plant is located. Johnson was employed in Carrollton, Texas and Harris in Seattle, Washington. Both of them elected to stay where they were, rather than give up their new jobs and relocate again merely to accept temporary reinstatement *pendente lite.*

A third employee, Bishop, also had moved (to Wichita, Kansas, approximately 100 miles from Otis) and found a new job, but he nevertheless intially responded favorably to the offer of reinstatement. Petitioner then sent a letter to Bishop (as well as to two other dischargees who had expressed interest in the offer of reinstatement), which was plainly designed to discourage him from returning. The letter (set forth in full at A6-A7) referred to recent developments in the continuing litigation, including the fact that petitioner had moved to dissolve the injunction, and suggested that "these latest developments might affect your decision to disrupt the status that you have been in for over 8½ months to return to KRH on a temporary reinstatement basis set forth in the order of temporary

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[1] Even if the Board were to issue its own reinstatement order, as it ultimately did, that order would not be self-executing, and petitioner would have been free to ignore it until it was enforced by a Court of Appeals. The District Court injunction expired automatically upon issuance of a final decision by the Board, since only a Court of Appeals has jurisdiction to grant temporary relief after a Board order has issued. Section 10(e), 29 U.S.C. § 160(e); *Sears Roebuck & Co.* v. *Carpet Layers Local 419,* 397 U.S. 655 (1970).

injunction." After receiving this letter, Bishop also declined reinstatement.

Meanwhile, the underlying unfair labor practice case continued, resulting ultimately in a Board decision finding petitioner guilty of numerous violations, including the discriminatory discharge of the employees involved here. *George A. Angle, d/b/a Kansas Refined Helium Co.*, 176 N.L.R.B. 1032 (1969). The Board issued an order directing petitioner, *inter alia*, to offer the discharged employees 'immediate and full reinstatement . . . and make each of them whole for any loss of pay they may have suffered by reason of the discrimination against them . . . .'' Petitioner did not comply with this order until after it was enforced by the Court of Appeals, and a petition for certiorari to this Court had been denied. *Oil, Chemical & Atomic Workers* v. *NLRB*, 445 F.2d 237 (D.C. Cir. 1972), *cert. denied*, 404 U.S. 1039 (1972).

Thereafter, numerous issues arose concerning petitioner's compliance with the Board's order. Indeed, it became necessary for the Board to institute contempt proceedings, and the Court of Appeals ultimately found petitioner in contempt for failing properly to carry out that order. *Oil, Chemical & Atomic Workers* v. *NLRB*, 92 L.R.R.M. 3059 (D.C. Cir., June 7, 1976). The Board also initiated a supplemental administrative proceeding to determine the precise amount of back pay which petitioner owed to the discharged employees.

In the back pay proceeding, petitioner contended that it should not be liable for any back pay beyond the date on which any employee declined the offers of temporary reinstatement made pursuant to the preliminary injunction. The Administrative Law Judge rejected

this contention (A26), but the Board, by a 3-2 vote, ruled in favor of petitioner. (A17). The Court of Appeals reversed, and it is that decision which petitioner asks this Court to review.

ARGUMENT

Contrary to petitioner's contentions, this case does not present any broad or novel issues of law which would merit the attention of this Court. The applicable legal principles are well-settled. The controversy in this case is solely concerned with how these principles should be applied to the particular factual circumstances involved here.

When the Board finds that an employee has been discharged in violation of the Act, the standard remedy is to order the employer to offer the employee full and unconditional reinstatement to his job, and to make him whole for all wages he has lost in the interim. "Only thus can there be a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." *Phelps Dodge Corp.* v. *NLRB*, 313 U.S., 177 194 (1941).

As a "general rule," the amount of back pay is the "difference between what [the employee] would have earned but for the wrongful discharge and his actual interim earnings from the time of discharge until he is offered reinstatement." *Heinrich Motors, Inc.* v. *NLRB*, 403 F.2d 145, 148 (2nd Cir. 1968). This amount may be reduced, however, to the extent that the employee incurs a "willful loss of earnings"—i.e., "fails to remain in the labor market, refuses to accept substantially equivalent employment, fails diligently to search for alternative work, or voluntarily quits alternative employment without good reason."

NLRB v. *Mastro Plastics Corp.*, 354 F.2d 170, 174 n. 3 (2d Cir. 1965), *cert, denied,* 384 U.S. 972 (1966). Accord: *NLRB* v. *Madison Courier, Inc.,* 472 F.2d 1307, 1317 (D.C. Cir. 1972). However, only unjustified refusals to find or accept other employment are penalized under this rule, and the employee is only required to make "reasonable efforts" to mitigate his loss of income. *NLRB* v. *Arduini Mfg. Co.,* 394 F.2d 420, 422-23 (1st Cir. 1968); *NLRB* v. *Miami Coco-Cola Bottling Co.,* 360 F.2d 569, 575 (5th Cir. 1966); *Heinrich Motors, Inc.* v. *NLRB, supra,* 403 F.2d at 148-49. For example, an employee is not obliged to accept employment which is located an unreasonable distance from his home. *NLRB* v. *Madison Courier, Inc., supra,* 472 F.2d at 1314; *Florence Printing Co.* v. *NLRB,* 376 F.2d 216, 220-21 (4th Cir. 1967), *cert. denied,* 389 U.S. 840 (1967); *General Teamsters Local 439,* 194 N.L.R.B. 446, 451 (1971); *American Bottling Co.,* 116 N.L.R.B. 1303 (1956). Nor is an employee penalized because he accepts interim employment which pays less than his former job, unless his decision to do so is demonstrably unreasonable. See *NLRB* v. *Arduini Mfg. Corp., supra,* 394 F.2d at 422-23; *J. H. Rutter Rex Mfg. Co.* v. *NLRB,* 473 F.2d 223, 242 (5th Cir. 1973), *cert. denied,* 414 U.S. 822 (1973); *East Texas Steel Castings Co.,* 116 N.L.R.B. 1336, 1344-45 (1956), *enforced,* 255 F.2d 284 (5th Cir. 1958).

An employer can, of course, terminate his back pay liability at any time by offering a discharged employee full, permanent, and unconditional reinstatement to his former position. E.g., *Nevada Tank & Casing Co.,* 131 N.L.R.B. 1352, 1353 (1961); *Anderson Plumbing & Heating Co.,* 203 N.L.R.B. 18, 19 (1973). But anything less than an offer of full and unconditional reinstatement will not suffice. See, *e.g., Hydro-Dredge Accessory Co.,* 215 N.L.R.B. No. 5, 87 L.R.R.M. 1557 (November 27, 1974); *Harvey Carleton d/b/a/ Cell-Tak Co.,* 143 N.L.R.B. 295, 304 (1963).

In the present case, the Board acknowledged that petitioner's offers of temporary reinstatement "pending the final determination of the matter by the Board" were not the equivalent of the "normal, permanent offer required by employers to terminate final backpay liability for 8(a)(3) violations." (A20). The Board held, however, that by refusing the offers of temporary reinstatement made by petitioner under the duress of an injunction, the employees incurred a "willful loss of earnings" for which petitioner should not be held responsible.

The Court of Appeals concluded that the Board had misapplied the "willful loss of earnings" doctrine to the particular facts presented. The court pointed out that employees Johnson and Harris had not only moved "several hundred miles away to secure [new] employment," but, at the time the offers of temporary reinstatement were made, were actually earning more on their new jobs than they would have earned on their old jobs. (A13). In these circumstances, the court held, the refusal of the offer could not be deemed a willful loss of earnings. "Aside from the *temporary* character of the offer as opposed to their present permanent employment, and the fact that the offer paid *less* than their present employment and involved tension-filled working conditions, an employee is not required to accept employment at a great distance from his home." (A14, emphasis in original).

The court reached the same conclusion with respect to employee Bishop. The court acknowledged that, al-

though Bishop had also found other employment, his new job paid somewhat less than his prior job with petitioner, and he was located somewhat closer to petitioner's plant. The court pointed out, however, that Bishop had initially accepted the offer of temporary reinstatement, and then changed his mind as a result of petitioner's own letter, which conveyed "the message that the offer was to a temporary position and extended only for the life of the then-under-challenge § 10(j) order. Thus faced with the possibility that the injunction would soon be vacated and that Angle would discharge him for the second time, Bishop declined to return to KRH." (A16). The refusal in these circumstances to leave a permanent job and move his home a second time to accept temporary reemployment was not, the court concluded, an unreasonable decision which could be deemed to constitute a willful loss of earnings. (A16-A17).

Petitioner contends that the court improperly infringed on the broad discretion of the Board to frame remedies under the Act. This contention was answered by the court itself:

> "While the Board, in its administration of the Act, has broad discretion in shaping remedies, we have held (in the context of a backpay case) that it 'cannot act arbitrarily nor can it treat similar situations in dissimilar ways. The Board has a responsibility to administer the Act fairly and rationally.'" (citations omitted). (A12)

The Board did not exercise its statutory discretion in this case by adopting a special rule or policy applicable to offers of reinstatement made pursuant to a

Section 10(j) injunction. Rather, it held that such offers should be given "the same status as any other valid, interim offer." (A18). Thus, the question in this case was simply whether the employees' refusal to accept the offers constituted a "willful loss of earnings." The Court merely held that the Board had misapplied the "willful loss of earnings" doctrine, as it had been shaped and defined in the Board's own prior decisions, to the particular facts of this case.

Petitioner attempts to characterize this case as one involving, not the application of established legal principles to particular facts, but rather a novel issue "of first impression" as to whether an employee has a duty to accept an offer of reinstatement made pursuant to a Section 10(j) injunction. In effect, petitioner wants this Court to rule, as a matter of law, that employees must accept such offers or forfeit their claim to back pay. But such action by this Court *would* constitute an unwarranted usurpation of the Board's remedial discretion. The Board itself did not accept petitioner's contention that there should be a special rule for reinstatement offers made pursuant to an injunction. It held that such offers should be treated the same as any other "valid, interim offer." This means that the employee is only obliged to accept the offer if a refusal to do so would constitute a "willful loss of earnings."

The Board found that the refusals in this case did constitute a "willful loss of earnings," but the Court of Appeals concluded that this finding was not supported by the facts. While we believe the court was clearly correct, the issue in any event is not one which warrants review by this Court.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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